EFFECTS IMPLICATIONS AND REPURCUSSIONS OF THE CONNUNDRUM OF ARBITRAL CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

1. INTRODUCTION

International arbitration is specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.[1] Unlike the litigation in courts of law, arbitration is a more private method of adjudication, which requires minimal or no public involvement. Arbitration process is usually private, each party presenting its case, in a real sense a chance for each side to vent their sentiments outside the court of law, though in a judicial environment. The arbitrators then ascertain each side's position in the matter, deciding with the options for resolution and bottom lines.

Arbitration is generally the private means of dispute settlement. The way contract signed by the parties is private between them; the same way is the arbitration agreement. Accordingly, when a dispute arises between the parties it is to be resolved by deploying a private dispute resolution system agreed between the parties, subject to certain safeguard. Arbitration being one of the modes of dispute settlement, states the same mechanism of private dispute settlement.

Thus the arbitral process has the principal characteristics of control of party autonomy contrary to the national court's procedure, which is binding upon the parties having private mechanism of dispute resolution.[2]

The commercial expediency in the modern era has necessitated the dispute resolution methodology be catalyzed in international commercial transactions. Since, arbitral process carries such characteristics which expedite the process of dispute resolution, making it impervious to be accepted as the best means of dispute resolution.

2. IMPLIED DUTY OF CONFIDENTIALITY

Arbitration, as discussed earlier, in comparison with the national courts has paradoxically different features. The word private/privacy means that the existence of arbitration, the subject matter, the evidence, and the documents that are prepared for and exchanged, in arbitration and arbitrator's award cannot be divulged to third parties.[3] Thus the choice of arbitration is precisely to secure privacy and confidentiality.

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[1] Julian DM Lew, Loukas A Mistelis, Stefen M Kroll Ch.1, pp 01 Comparative International Arbitration, Edition 2003.

[2] Julian DM Lew, Loukas A Mistelis, Stefen M Kroll Ch.1, pp 04 Comparative International Arbitration, Edition 2003.

[3] Julian DM Lew, Loukas A Mistelis, Stefen M Kroll Ch.1, pp 08 Comparative International Arbitration, Edition 2003.

Arbitration being the private process controlled by the parties makes the implied duty of confidentiality discretionary with regards to applicable law and the party autonomy. When parties resort to arbitration, they choose to for the applicable law. The applicability of arbitration rules is different in different countries. Not all states expressly follow the implied duty of confidentiality. The division among the state laws/rules on existence and scope of the duty of confidentiality fosters uncertainty-the bane of international business transactions.[4] Thus applicable law is one of the puns of conundrum of confidentiality. Resolving such a riddle amidst the legal technicalities, though impeccable, is the bottom line of the research proposal so put forth.

In the absence of an express obligation of confidentiality, the parties must look to the governing law. Unsurprisingly, the position on confidentiality and privacy varies, sometimes greatly between jurisdictions. The analysis below, therefore, seeks to examine, under a specifically chosen sample of varying local laws and institutional rule, to what extent the arbitration process can be said to be truly confidential.[5]

3. COUNTRIES, WHICH RECOGNIZE IMPLIED DUTY OF CONFIDENTIALITY:

A number of national courts have considered the issue of confidentiality in arbitration. Unfortunately the jurisprudence is sporadic and inconsistent.[6] For over 120 years until 1990s there was a belief in the English sphere that arbitral proceedings were both private and confidential and the English judiciary, in a line of cases starting with Dolling-Baker vs. Merrett[7] confirmed the existence of a confidentiality obligation arising out of the very nature of arbitration.[8] London as the situs of much international arbitration has significantly made the English law hold confidentiality as an implied duty, to be exercised by the arbitral parties. In the leading case of Ali Shipping Corp. vs. Shipyard Trogir[9], an English court held that such an obligation is implied in every arbitration agreement as "an essential corollary of the privacy of arbitration proceedings."

Despite the silence of English Arbitration Act 1996, on the issue of confidentiality, English law is very precise and exacting upon the obligation and implied duty of confidentiality. To be sure English law recognizes a number of exceptions to general duty of confidentiality, which led the drafters of English Arbitration Act, 1996 to omit an express reference to confidentiality in the new

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[4] Jaffery W. Sarles, Mayer, Brown, Rowe & Mowe LLP, *Solving the Arbitral Confidentiality Conundrum In International Arbitration,* pp 06, American Arbitration Association's Annual Volume, ADR & the law (18th Edition 2002); See Constantine, Partasides, Bulbank-*The Final Act*, 15 Mealey's Intl' Arb. Rep. 44 (Dec. 2000).

[5] Sarah Walker, Bodil Ehlers, Bird & Bird, *Lost in translation-what does confidentiality in arbitration really mean?* http://www.globalarbitrationreview.wm/handbooks/3/sections/5/chapters/33/lost....... (last visited 20/09/2007).

[6] Thomson, Claude R, *Confidentiality in Arbitration: A VALID ASSUMPTION? A PROPOSED SOLUTION!* pp 01, Dispute Resolution Journal, May-July 2007, http://findarticles.com/p/articles/mi_qa3923/is_200705/ai_19435143/print, (Last viewed on 06th October, 2007)

[7] [1990] 1 WLR 1205

[8] Hew R. Dundas, *Confidentiality Rules Ok? Recent Developments affecting the confidentiality of Arbitrations* see www.dundasarbitration.com.

[9] 2 All.E.R. 1 Lloyd's Rep. 643

statute. Exceptions for disclosure were enshrined in Ali Shipping[10] case, where the court permitted disclosure **(i).** by the consent of parties, **(ii).** but also in confirmation and enforcement proceedings, **(iii).** by court order in a later action, **(iv).** by court order where "reasonably necessary" to protect or pursue a legal right, **(v).** and where disclosure would be "in the interest of justice".[11] Thus, parties to arbitration governed by English arbitration law takes a considerable risk by public disclosure of information about the arbitration.[12] Many commentators opposed to the erosion of arbitral confidentiality rallied around *Ali Shipping* decision.[13]

Lately, two significant cases heard in England, the *Moscow* [14] case in the High Court, and the *AEGIS* [15] case in the judicial committee of the Privy Council further addresses the key emerging issue of confidentiality in international commercial arbitration, more precisely with respect to Article 6 ECHR. *Moscow* case refutes, so far as English law is concerned, one of the main arguments against an inherent confidential obligation to the effect that enforcement or challenge proceedings in Court necessitates revealing details of the arbitration, particularly the award.[16]

French law appears to provide even more stringent protection for the confidentiality of arbitral proceedings and awards. In *Aita vs. Ojjeh,*[17] a French court dismissed an action to annul an arbitral award rendered in London, penalizing the party bringing action for thereby breaching the principle that arbitral proceedings are confidential.[18] The decision does not even appear to allow for the narrow exceptions recognized by English law.[19]

One country has actually codified a duty of arbitral confidentiality. Section 14 of New Zealand's Arbitration Act of 1996 states that, unless the parties agree otherwise, "the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings".[20]

The Hungarian Law does not specifically contain the rules on confidentiality, yet the arbitration act along with the rules of Chamber of Commerce and Industry's Court of Arbitration do secure the requirement and principle of

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[10] Ibid.

[11] Ibid. pp 645.

[12] Jaffery W. Sarles, Mayer, Brown, Rowe & Mowe LLP, *Solving the Arbitral Confidentiality Conundrum In International Arbitration,* pp 04, American Arbitration Association's Annual Volume, ADR & the law (18th Edition 2002).

[13] See Sean Upson *Arbitrations-How confidential are they?* DISP. RES. NEWSL (Baker Mckenzie, London), July 1998.

[14] Ibid.

[15] Associate Electric & Gas Ins. Serv. Ltd vs. European Reinsurance Co. of Zurich (Bermuda), Privy Council Appeal # 93/2001; 29th January, 2003, refer [2003] 69 Arbitration 3, the parties hereinafter 'AEGIS' and 'European Re'.

[16] See Commentary by John P. Gaffney, *"Confidentiality in International Arbitration: A Recent Decision of the Privy Council"* 18 Mealey's Int'l Arbitration Rep. 5 (2003).

[17] 1986 REVUE DEL' ARBITRAGE 583 (Cour d' Appel de Paris, February 18, 1986).

[18] See ICC Award No. 6263 of 1992, 20 Y.B. COM. ARB. 58 (1995) (Exemplifying the confidentiality of arbitration, the parties' disclosures and the arbitrators' award under French standards).

[19] See Jan Paulson & Nigel Rawding; *The Trouble With Confidentiality*, 11 Arb. Int'l 303,312 (1995); Also see Jaffery W. Sarles, Mayer, Brown, Rowe & Mowe LLP, *Solving the Arbitral Confidentiality Conundrum In International Arbitration,* pp 04, American Arbitration Association's Annual Volume, ADR & the law (18th Edition 2002); See Constantine, Partasides, Bulbank-The Final Act, 15 Mealey's Intl' Arb. Rep. 44 (Dec. 2000).

[20] New Zealand Arbitration Act, § 14 (1996), http://rangi.knowledge-basket.co.nz/gpacts/public/text/1996/se/099se14.htmln.

confidentiality in commercial arbitration. Section 29 [21] provides that, unless there is a contrary agreement from both parties, arbitration proceedings are not to be public. Furthermore, arbitral confidentiality is the primary and stringent requirement under the Romanian law. Article 14 of the Rules of Arbitration refers to the obligation of the court, the tribunal, the staff of the court and the Chamber of Commerce.[22] Romanian arbitration rules expressly holds the arbitrators responsible for paying damages, in circumstances where they are in breach of confidentiality.[23] Though law of Thailand is silent on the issue of arbitration, however, the Arbitration Rules, which were established pursuant to Arbitration Act, prescribe that *"the arbitrator , director and the Institute shall not disclose the award to the public unless with the consent of the parties."* [24]

4. COUNTRIES, WHICH DO NOT RECOGNIZE IMPLIED DUTY OF CONFIDENTIALITY

English law ranges from a general rule of confidentiality to a higher extent of disclosure. Contrary to this Swedish Supreme Court, in its decision of *Bulgarian Foreign Trade Bank Ltd. vs. Al Trade Finance Inc.,*[25] held that there is no implied duty of confidentiality in private arbitrations, thence there are only two ways to ensure the confidentiality of arbitration proceedings under Swedish law, expressly contract for it or adopt arbitration rules that expressly provide for it.[26]

Sweden was not the first country to deny any implied duty of confidentiality. In a decision that "crashed like a giant wave-a veritable Australian tsunami-on the shores of jurisdictions around the world",[27] the High Court of Australia held in *Esso Australia Res. Ltd. vs. Plowman* [28] that confidentiality, unlike privacy, is not "an essential attribute" of commercial arbitration.[29] In another case of United States, where no federal court above the district court level has ruled on this issue, rejecting any implied duty of confidentiality in commercial arbitration. In the leading case *United States vs. Panhandle E. Corp.* [30] the court held that there is no inherent duty of confidentiality unless the parties contract for it, and that the institutional rules so (ICC Rules of Arbitration) involved placed no obligation of confidentiality on arbitrating parties.[31]

The issue of confidentiality is not yet settled under the Canadian law, thus like most countries Canada and its provinces do not preserve privacy and

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[21] See Act LXXI of 1994 on Arbitration Act of Hungary; See also Money and Capital Markets Arbitration Tribunal regulated by CXX of 2001 on Capital Markets; See also Telecommunication Arbitration Tribunal regulated by Act C of 2003 on Electronic Telecommunication.

[22] Rules of Arbitration, Romanian Chamber of Commerce. See also Article 07 (expressly requiring the arbitration file to be kept confidential).

[23] See Book IV of Romanian Civil Procedure Code, Article 353.

[24] Thai Arbitration Act B.E. 2545 (2002), Rule 30.

[25] Case No.T 1881-99 (Swedish Sup. Ct.27 October 2000).

[26] Jaffery W. Sarles, Mayer, Brown, Rowe & Mowe LLP, *Solving the Arbitral Confidentiality Conundrum In International Arbitration,* pp 02, lines 22-27, American Arbitration Association's Annual Volume, ADR & the law (18th Edition 2002).

[27] L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality,* 10 ARB. INT'L 131, 134 (1999).

[28] (1995) 128 A.L, R 391, 183 C.L.R 10 (Austl.).

[29] Jaffery W. Sarles, Mayer, Brown, Rowe & Mowe LLP, *Solving the Arbitral Confidentiality Conundrum In International Arbitration,* pp 04, American Arbitration Association's Annual Volume, ADR & the law (18th Edition 2002).

[30] 118 F.R.D 346(D. Del. 1988).

[31] See American Cent. E. Tex. Gas Co. vs. Union Pac. Res. Group, 2000 WL 33176064, at *1 (E.D. Tex, July 27, 2000).

confidentiality in domestic or international arbitration. In order to ensure confidentiality in an arbitral process an interim relief can be sought through Canadian courts. Seeking such relief from a Canadian court may well jeopardize the confidentiality of the arbitration unless the court grants a shielding access to the court proceedings (that is permitting an *in camera* hearing) and sealing the court file.[32] The well established presumption in Canada, which directly impairs the efficacy of confidentiality in commercial arbitration, is that courts are open to public. The presumption is rooted in the *Canadian Charter of Rights and Freedoms* and finds unequivocal expression in decisions of the Supreme Court.[33] The success in protecting confidentiality under the Canadian law would be pyrrhic, if inadvertent disclosure of confidential information in commercial arbitration is possible easily.

5. INSTITUTIONAL RULES -- GENERAL SUPPORT FOR CONFIDENTIALITY

With the differences among the national laws it becomes imperative to refer to the institutional rules. Simply incorporating the rules of arbitral institution is not likely to resolve uncertainties about confidentiality. Institutional rules commonly provide that the arbitrators shall maintain the confidentiality of the proceedings.[34]

Article 25(4) of the Arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) provides that hearing shall be held "*in camera"*.[35] The UNCITRAL Arbitration Rules 1976 apply a duty of confidentiality concerning an *arbitral award,* by determining that "the award may be made public only with the consent of both parties".[36] However, it is interesting to note

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[32] George M. Vlavianos, *Seeking Interim Measures From A Canadian Court In International Commercial Arbitration: Putting Confidentiality At Risk*, ADR Institute of Canada, National Conference Calgary, Alberta, November 17, 2006, Arbitration Stream-Session

[33] Canadian Broadcasting Corp. vs. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 at paragraph 23.

[34] See e.g. American Arbitration Association, International Arbitration Rules, Art. 34, (http://www.adr.org/index/2.1jspJSPssid=13777&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focus Area\international\AAA175-1000.htm).

See also AAA Commercial Mediation Rules, Rule 12 says:

> *"Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.*
> *The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:*
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> *a. views expressed or suggestions made by another party with respect to a possible settlement of the dispute;*
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> *b. admissions made by another party in the course of the mediation proceedings;*
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> *c. proposals made or views expressed by the mediator; or*
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> *d. the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator."*

(http://www.internetmediator.com/medres/pg1020.cfm#M-12).

[35] United Nations Commission On International Trade Law (UNCITRAL), Arbitration Rules, Art. 25(4) (adopted December 15, 1976), (http://www.uncitral.org/en-index.htm)

[36] Ibid, see 32(5) (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)

that the *Travaux Preparatoires*[37] of the said Rules mention that "under the national legislation of some countries, an award could be made public".[38]

The rules of ICC, the largest international arbitration institution, simply exclude from hearings "person not involved in the proceedings"[39] and permit the arbitral tribunal to "take measures for protecting trade secrets or confidential information"[40].It is, however, observed that the ICC rules are silent upon the issue of confidential regarding the award, material produced and the information divulged in the proceedings. There is a wider scope of the protection of the duty of confidentiality in the rules of the Statutes of International Court of Arbitration of the ICC.[41]

The WIPO Arbitration Rules are very strict and comprehensive, having rigorous confidentiality protections,[42] with few exceptions[43].

The arbitral institutions, consistent with the English Law, provide greater protection to arbitral confidentiality. LCIA Arbitration International[44] recognizes and obligates a general duty of confidentiality unless the parties expressly agree otherwise.[45] The stringent policy of LCIA to keep the entire arbitral process confidential is evident from the fact that, unlike ICC, LCIA does not publish its award unless the parties and the tribunal consent.[46]

The CIETAC Arbitration Rules[47] determines that "hearing shall be held in camera"[48] and forbids parties and all persons involved in the arbitration from disclosing "the substantive or procedural matters of the case "to outsiders".[49]

The Arbitration Rules of Stockholm Chambers of Commerce, contrary to the principles set in *Bulgarian*[50] case, clearly maintain confidentiality of arbitration and the award.[51] The organization of the SCC Institute contemplates the same.[52] Milan

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37 UNCITRAL Arbitration Rules, 1976, (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html#_ftn1). Also see UNCITRAL Model Law Working Group stating "*it may be doubted whether the Model Law should deal with the question whether an award may be published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules chosen by them*".

38 Roi Bak, *Arbitration-Duty of Confidentiality?* (www.israelbar.org.il/uploadFiles/**Confidentiality**_of_Arbitration.pdf). Also see UNCITRAL Notes on Organizing Arbitral Proceedings (1996) *"there is no uniform answer in national laws as to the extent to which the participants in arbitration are under the duty to observe the confidentiality of information relating to the case".*

39 International Chambers of Commerce (ICC), Rules of Arbitration, Art. 21.3 (effective January 01, 1998), (http://www.iccwbo.org/court/english/arbitration/rules.asp).

40 Ibid, see Art. 20.7.

41 Rule 6

42 World Intellectual Property Organization (WIPO), Arbitration Rule 52 (http://www.wipo.int/amc/en/arbitration/rules/#conf2).

43 Ibid, see Rules 73-75.

44 LCIA Arbitration International is the new name of the London Court of International Arbitration (LCIA). The new LCIA Rules that had been in force since 1985, entered into force on January 1, 1998.

45 LCIA, Arbitration Rules, Art. 30.1 (effective January 01, 1998), (http://www.lcia-arbitration.com/lcia/rulecost/english.htm).

46 Ibid, see Art. 30.3.

47 China International Economic and Trade Arbitration Commission (CIETIC), Arbitration Rules, (Revised and Adopted by the China Council for the Promotion Of International Trade/China Chamber of International Commerce on January 11, 2005 effective from May 01, 2005) (http://www.cietac.org.cn/english/rules/rules.htm).

48 Ibid, see Article 33.1.

49 Ibid, see Article 37.

50 See supra note 25

51 Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce, Rule 46 (http://www.sccinstitute.com/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf).

52 Article 9

Chamber of Commerce requires "all in consultation relating to the proceedings confidential".[53]

ICSID[54]also contains provisions, which protects confidentiality in the arbitral process. ICSID convention provides that: "*the centre shall not publish the award without the consent of the parties*".[55]

The inception of NAFTA Chapter 11,[56] has further aggravated the uncertainty on confidentiality, largely for the US and Canadian dominance, who do not hold confidentiality as the necessary part of arbitral process.[57]

6. LIMITS TO CONFIDENTIAILITY

Whilst arbitral process is to be confidential, there are yet other integrated factors, which require information to be divulged from the parties actually part of the entire process. In many instances the corporate entities may be required to disclose both the proceedings and any adverse awards under their reporting obligations.

In the UK, the Disclosure Rules require companies listed on full list to disclose as soon as possible any information which, if generally available, would be likely to have a significant effect on its share price. Further, the listed company is under an obligation to disclose information to the investor anything material in the listing of the documents.[58]

In the US, SEC rules and financial statements regulations may require disclosure of material arbitration proceedings which a company is defending and possibly those in which the company is claimant.[59]

7. PUBLIC INTEREST IN DISCLOSURE AND CONFIDENTIALITY:

A concurrent and sometimes overriding public interest sometimes has to be recognized. It is appropriate to lift the cloak of confidentiality in a number of circumstances including the following:

1. The subject matter or the existence of the dispute and/or its outcome must be publicly reported because it may be material to the financial condition of a public company.

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[53] International Arbitration Rules-Milan Chamber of Commerce (2004) Rules 8(1) & (2).

[54] The International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group based in Washington, D.C., was founded in 1966 pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* the **ICSID Convention** or Washington Convention. Also see http://www.worldbank.org/icsid/.

[55] Ibid, see Article 48(5).

[56] The North American Free Trade Agreement (NAFTA)**,** signed by Canada, United States of America and Mexico in January, 1994. See http://www.dfait-maeci.gc.ca/nafta-alena/menu-en.asp.

[57] Confidentiality of NAFTA Chapter 11 Proceedings *The American Journal of International Law*, Vol. 95, No. 4 (Oct., 2001), pp. 885-887.

[58] See FSA Regulatory Information Services: http://www.fsa.gov.uk/Pages/Doing/UKLA/ris/index.shtml.

[59] See http://www.sec.gov/rules/proposed/33-8138.htm.

2. Disclosure of the dispute and the surrounding circumstances or outcome may be required by shareholders, partners, creditors or others having a legitimate business interest in the affairs of one of the parties to the dispute.

3. One of the parties may conclude that its commercial interests and the interests of shareholders and potential shareholders would be enhanced by publicly disclosing information about the dispute and any resulting award and that, accordingly, it has a duty to make such disclosure.

4. One or both of the parties may be subject to obligations (e.g., as a fiduciary) to disclose information in spite of any express or implied term to the contrary in the arbitration agreement.

5. It may not be possible or proper to shield the company's auditors and outside advisors from the fact and nature of the dispute and the surrounding circumstances and the ultimate award, whether confidential or not.

6. The parties may have duties of disclosure to insurers.

7. The parties must be free to present the award and relevant surrounding circumstances in a public court to either enforce or appeal the award or use it as evidence in another related proceeding.

8. The parties may be obliged to disclose evidence from the arbitration in another proceeding.

9. Evidence of illegal or criminal conduct that should be reported to public authorities may be uncovered during the course of the proceedings.

The above public interests[60] which require the disclosure affects the solution of the conflicting standards, confidentiality conundrum faces. A solution which has not yet been looked into depth.

8. CONCLUSION

In lieu of the above discussion, the incongruity and conflicting confidentiality standards among the national laws and the institutional rules, with special reference to English Law are evident. The pseudonym of confidentiality needs more concentration in an event, where the impact of conflict is on public policy. The effects and impacts of confidentiality provision on contracting parties from states having conflicting arbitral confidentiality provisions, is of pivotal importance. In this regard the role of institutional rules and decisions of various arbitral tribunals formed under the institutional rules, impact of conflicting standards, situation in multi-party arbitration, repercussions to the public policy of contracting parties and the obstacles to conflicts and solution to the conundrum, is hard to be seen to be achieved.

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[60] Thomson, Claude R, *Confidentiality in Arbitration: A VALID ASSUMPTION? A PROPOSED SOLUTION!* pp 01, Dispute Resolution Journal, May-July 2007, http://findarticles.com/p/articles/mi_qa3923/is_200705/ai_19435143/print, (Last viewed on 06th October, 2007).